



Northumberland County Council

NORTH NORTHUMBERLAND LOCAL AREA COUNCIL
21 June 2018

PUBLIC RIGHTS OF WAY

DEFINITIVE MAP MODIFICATION ORDER (No 22) 2016

BYWAYS OPEN TO ALL TRAFFIC Nos 9 & 56 (PARISHES OF EWART & KIRKNEWTON)

Report of the Executive Director of Local Services
Cabinet Member: Councillor Glen Sanderson, Environment and Local Services

Purpose of report

To inform the Committee of the interim decision, of the Inspector appointed by the Secretary of State for the Department of the Environment, Food and Rural Affairs, to determine, following an exchange of written representations, the above Order that attracted two objections.

Recommendations

It is recommended that the Committee notes the Inspector's interim decision. He proposes to confirm the Order, subject to the removal of the most northerly 355 metres and most southerly 395 metres of the byway route, on the ground that these sections do not satisfy the balance of user test for being recorded as a byway open to all traffic.

1.0 BACKGROUND

- 1.1 In September 2016 the County Council made, and in October 2016 advertised, Definitive Map Modification Order (No 22) 2016. This Order sought to record two byways open to all traffic on the basis of historical documentary evidence. Modification Order (No 22) 2016 attracted 2 objections, from Kirknewton Parish Council and from a resident of Newcastle upon Tyne. The parish council's objection was made on the basis that the route (particularly the river crossing) was unsuitable for public motor vehicular traffic. The other objector supported the existence of a public motor vehicular right of way, but argued

that the Council had not done enough to justify recognizing the route as a byway open to all traffic.

- 1.2 At its meeting in January 2017, the Rights of Way Committee agreed with the officer recommendation that, on a balance of probabilities, public motor vehicular rights had been shown to exist, that the Order be referred to the Secretary of State for determination, and that the Council support confirmation of the Order, as made.
- 1.3 In August 2017, the Order was submitted to the Secretary of State for determination, the Planning Inspectorate deciding that the matter was one that was suitable for determination by means of written representations.
- 1.4 On 27th April 2018, the Inspector appointed by the Secretary of State issued his interim decision letter. It is an interim decision, because he proposes to confirm the Order subject to the removal of the most northerly 355 metres and the most southerly 395 metres of the Order route. The Inspector is satisfied that, on a balance of probability, based on the documentary evidence available, public motor vehicular rights do exist over the whole Order route. He is not, however, satisfied that the northern and southern ends of the route satisfy the test for being recorded on the Definitive Map as a byway open to all traffic (see paragraph 18 of the decision letter).

BACKGROUND PAPERS

Local Services Group File: Modification Order (No 22) 2016 & B/19/9z & B/26/56z
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Wildlife and Countryside Act, 1981

**Definitive Map of Way
 Public Rights of Way
 for the
 County of Northumberland**

**The Northumberland
 County Council**

**Modification Order
 (No.22) 2016**

Public Footpath to be deleted	Public Footpath	Public Bridleway	Restricted Byway	Byway Open to All Traffic
O.S. Map NT 93 SW	Definitive Map No 27	Scale: 1/10,000	Date: May 2016	
Former District(s) Berwick	Parish(es) Ewart/Kirknewton			

Order Decision

Site visit on 21 March 2018

by **Mark Yates BA(Hons) MIPROW**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 27 April 2018

Order Ref: ROW/3182651

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as The Northumberland County Council Definitive Map Modification Order (No 22) 2016.
- The Order was made by the County Council of Northumberland ("the Council") on 26 September 2016 and proposes to add two byways open to all traffic ("BOATs") to the definitive map and statement, in the parishes of Ewart and Kirknewton, which form a continuous route ("the claimed route"), as detailed in the Order Map and Schedule.
- There were two objections outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.

Procedural Matters

1. All of the points referred to below correspond to those delineated on the Order Map.

Main Issues

2. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows that two BOATS, which are not shown in the map and statement, subsist. The burden of proof to be applied is the balance of probabilities.
3. I shall consider whether the historical documentary evidence provided is sufficient to infer the dedication of a highway over the claimed route at some point in the past. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.
4. The Natural Environment and Rural Communities Act 2006 ("the 2006 Act") has the effect of extinguishing unrecorded public rights of way for mechanically propelled vehicles unless one or more of the exemptions outlined in Section 67(2) or (3) of the Act is applicable. In this case, the information provided by the Council is supportive of the exemption in Section 67(2)(b) of the 2006 Act being applicable as the claimed route is not shown in the definitive map and statement but was included in the list of streets¹ immediately prior to 2 May 2006. This means that any public rights for mechanically propelled vehicles are preserved. However, I will need to consider the submissions made by one of

¹¹ In accordance with Section 36(6) of the Highways Act 1980

the objectors (Mr Kind) regarding whether the claimed route should be recorded in the definitive map and statement.

Reasons

Consideration of the documentary evidence

5. The claimed route is shown on commercial maps produced by Fryer (1820), Greenwood (1828) and Cary (1820-32). It is depicted in the same way as other public roads in the area and serves as a through route between the roads located at points H and K. Mr Kind also draws attention to the Cary map showing the claimed route as a parochial road. I accept that these maps could provide some support for the claimed route forming part of the local road network.
6. Similarly, Ordnance Survey ("OS") mapping from the 1860s onwards records the existence of the claimed route as a physical feature on either side of the River Glen. A ford is marked on the 2nd and 3rd Edition OS maps of 1899 and 1924. There is also the annotation "FB" to the west of the ford. This indicates that there has been a pedestrian crossing in this locality as well as a ford for some time. I address the footbridge later in this decision. The OS New Popular Edition map of 1945-47 includes the claimed route as a motor road.
7. An 1881 deposited plan for the proposed Alnwick & Cornhill Branch of the North-East Railway shows a section of the claimed route annotated "4". This plot is recorded in the accompanying book of reference as "*Public Highway*" and Mr Kind points to the continuation of this feature northwards. He has also provided a copy of the *North-eastern Railway Company's (Alnwick and Cornhill Branch) Act 1882*. Provision was made in the Act for the railway to cross certain roads on the level. One such crossing corresponds to plot 4, which is described under the heading "*Description of Road*" as a "*Public Highway*".
8. Mr Kind has provided details of the extensive statutory process undertaken from the initial survey of the land to the passing of the Act for the relevant railway, which I do not need to repeat here. Overall I find the railway documents to be strongly supportive of a proportion of the claimed route being a public road. By reference to the earlier and later map evidence, I consider it is very likely that this road continued over the remainder of the claimed route.
9. The claimed route is shown on a map produced in accordance with the Local Government Act 1929². This Act provided for the transfer of maintenance responsibility for highways from the Rural District Councils to the County Councils. These maps would usually provide conclusive evidence of the highway authority's acceptance of its maintenance responsibility. In this respect, they will be supportive of this route being a highway but they would not ordinarily serve as a definitive record of the highway rights in connection with the ways shown. The route was subsequently recorded as a publically maintained road in the Council's highway maps and schedules from the middle of the twentieth century and it is included in the list of streets.
10. Reference is also made by the Council to the inclusion of the claimed route in a schedule prepared in 1939 under the Restriction of Ribbon Development Act 1935. Although no explanation has been provided for the significance of this

² Often referred to as 'handover maps'

document, it describes the route as a section of road that proceeds via the Yeavinger crossing and the ford at the River Glen.

11. The twentieth century highway records are supportive of the claimed route being a highway maintainable at public expense. I find the railway documents to be strongly supportive of the route being a public road. The other map evidence provides further support for the claimed route being part of the historical road network. It follows in my view that on balance the route is a historical vehicular highway.

Whether the claimed route should be recorded as a BOAT

12. I have concluded above that the claimed route is a vehicular highway. Further, these public vehicular rights have not been extinguished by the 2006 Act. The remaining main issue to be determined is whether I should confirm the Order to add two BOATs to the definitive map and statement or decline to do so. Mr Kind has made submissions in support of the latter option.
13. Mr Kind submits that the first test to be applied arises from the definition of a BOAT in Section 66 (1) of the 1981 Act, namely "*a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used*". He says that where there is an absence of evidence regarding the 'balance of user test' outlined above consideration can be given to the 'character test'. In respect of the latter, reference is made to the case of *Marlene Peggy Masters and Secretary of State for the Environment, Transport and the Regions 2000*.
14. A lack of current use by vehicular traffic would not extinguish the public rights I have found to subsist. The only reason to not confirm any part of the Order would be on the ground that the route presently forms part of the ordinary road network. For this to be the case it would need to be evident that the predominant type of public use is by mechanically propelled vehicles. Whilst I note the concerns of the Council regarding how to gather such evidence, I can only reach my decision on the basis of the evidence provided and my observations of the site.
15. The written evidence of use provided is sparse. Mr Kind says he has used the route occasionally with other motorcyclists since the early 1980s. He cannot recall seeing other types of user and refers to the remote location of the claimed route. A consultation response from a representative of the British Horse Society outlines that the ford is regularly used by horse riders, except when the river is in flood. The response of the Cyclist's Touring Club representative is that a route in this locality has been cycled without any problems. In respect of the ford, the other objector (Kirknewton Parish Council) states this section cannot be used by the majority of vehicular traffic. It is asserted that the ford became impassable to motor vehicles in the 1980s. Presently, vehicles have to turn back or be rescued and there is signage to deter vehicles.
16. The claimed route is a continuation of the U1019 Road. From point H, it proceeds over a tarmac surface and serves various properties in Coupland as far as the point it turns southwards towards point J. Similarly, the section between point K and the former railway line also has a tarmac surface and

serves a few properties. Between these sections the route passes over a generally unsurfaced track and encompasses the ford.

17. The written evidence is supportive of some motor cycle and other use of the claimed route. There is also likely to be use by agricultural vehicles over the unsurfaced section for access to the adjacent fields. However, the evidence of use provided is not supportive of the middle section being used by mechanically propelled vehicles to such an extent to suggest it is part of the ordinary road network. This is supported by the nature of this section and the ford.
18. In contrast, it was clear from my visit that the two sections at either end of the claimed route are used by mechanically propelled vehicles. This was evident from the range of vehicles parked at the properties and the vehicles that passed me. Given the location of the claimed route, I consider that the vehicular use is likely to be the predominant type of public use of these sections. Therefore, I take the view that the end sections, as described in paragraph 16 above, should be removed from the Order as they form part of the ordinary road network. Whilst this will lead to only the middle section being recorded as a BOAT, a vehicular through route would continue to exist for the public.
19. Mr Kind has provided photographic evidence to indicate that the river has been straightened and the ford altered since the 1899 OS map. However, it appears that the highway, as included in the maintenance records, generally corresponds to the route shown on the Order Map. I consider on balance that the modified Order Schedule and Map, when taken together, adequately record the sections of BOAT to remain.
20. In respect of the footbridge, the measurement provided by Mr Kind and my observations of the site indicate that this structure is outside of the extent of the claimed route. I do not therefore consider that it should be added to the description of the section of the route to be retained in the Order. The question of whether public rights exist over the footbridge is a separate matter for which there is no evidence before me. The OS maps only indicate that there has been a footbridge in this locality for some time.

Other Matters

21. Some of the issues raised, such as whether it is desirable or suitable for the claimed route to be recorded as two BOATs, are not material to my decision.

Conclusion

22. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with modifications.

Formal Decision

23. I propose to confirm the Order subject to the following modifications:
 - Delete the first description in the Order Schedule and insert "*Adding thereto a byway open to all traffic, from a point marked X, at the junction of the continuation of the U1019 road, in a southerly direction for a distance of 110 metres to a point marked J on Byway Open to All Traffic No. 56 in the parish of Kirknewton, at a ford through the River Glen*".

- Delete the second description in the Order Schedule and insert *"As a 9 metre, narrowing to 5.2 metre, wide byway open to all traffic, from the junction of the continuation of the U1019 road and proceeding in a southerly direction for a distance of 100 metres, then continuing as a 5 metre wide byway, in a southerly direction for 10 metres through the River Glen to join Byway Open to All Traffic No. 56 in the parish of Kirknewton, at a ford through the River Glen"*.
 - Delete the third description in the Order Schedule and insert *"Adding thereto a byway open to all traffic, from a point marked J, on Byway Open to All Traffic No. 56 in the parish of Kirknewton, at a ford through the River Glen, in a general south easterly direction for a distance of 390 metres to a point marked Y, at the junction of the continuation of the U1019 road."*
 - Delete the fourth description in the Order Schedule and insert *"As a 5 metre wide byway open to all traffic, from Byway Open to All Traffic No. 9 in the parish of Ewart, at a ford through the River Glen, in a southerly direction for a distance of 5 metre. Thereafter as a 12 to 14 metre wide byway, continuing in a southerly direction for a further 20 metres. Then as a 6 metre wide byway, in a south-easterly direction for a distance of 95 metres, then as a 7.5 to 11 metre wide byway continuing in a south-easterly direction for a further 115 metres. Thereafter as an 8 to 10 metre wide byway in a southerly direction for a distance of 60 metres, then south-easterly direction for a distance of 95 metres to the junction of the continuation of the U1019 Road."*
 - Insert "X" on the Order Map to the north of point J.
 - Insert "Y" on the Order Map to the north of the former railway line.
 - Delete from the Order Map the section of the route between points H and X.
 - Delete from the Order Map the section of the route between points K and Y.
24. Since the confirmed Order would not show a way shown in the Order as submitted I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Mark Yates

Inspector